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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 555

THE TEXAS COMPANY, A DELAWARE CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 591–592)[1] is reported in 112 F. (2d) 744. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 454–486J) are reported in 17 N. L. R. B. 843.

[1] Pursuant to stipulation of the parties (R. 602–603), the record in this case for purposes of the petition for certiorari consists of: (1) the printed "transcript of record" filed in the court below, containing the complaint, decision of the Board, and other proceedings before the Board, and in the court below, which is referred to herein by the symbol (R.); (2) the appendix to the brief of The Texas Company, filed in the court below, containing certain portions of the evidence,

JURISDICTION

The decree of the court below (R. 592–594) was entered on July 15, 1940. A petition for rehearing filed by petitioner (R. 595–600) was denied on August 7, 1940 (R. 601). The petition for a writ of certiorari was filed on November 6, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Board's findings that petitioner dominated, interfered with, and supported the Employees Brotherhood, a labor organization of its employees, in violation of Section 8 (1) and (2) of the Act.

2. Whether the Board, upon admittedly valid findings that petitioner dominated, interfered with, and supported Employees Representation Plans, labor organizations of its employees, could order petitioner to cease and desist from such domination, interference, and support, although the Plans had been abandoned by petitioner prior to the Board's order.

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which is referred to herein by the symbol (Pet. App.); (3) the appendix to the Board's brief filed in the court below, containing certain other portions of the evidence, which is referred to herein by the symbol (Bd. App.); and (4) the appendix to the brief of Oil Workers International Union, Locals Nos. 228 and 367, intervenor in the court below, which is not referred to herein.

3. A further question urged by petitioner, but which we think is not properly presented, is whether the Board's order abridged petitioner's freedom of speech in violation of the First Amendment.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are set out at page 14 of the petition.

STATEMENT

Upon the usual proceedings [2] the Board issued its findings of fact, conclusions of law, and order (R. 454–486J). The facts, as found by the Board and as shown by the evidence, may be summarized as follows: [3]

From 1933 until this Court upheld the Act in April 1937, petitioner, as a means of combatting the Union's efforts to organize its employees, main-

[2] These, pursuant to Section 10 of the National Labor Relations Act, were: Charges and amended charges filed by the Oil Workers International Union, Locals Nos. 228 and 367, hereafter called the Union (R. 1–7, 10–14), complaint (R. 15–25), answer (R. 46–147), hearing before a trial examiner, intermediate report of the trial examiner (R. 160–178, 289–309), exceptions thereto (R. 181–287, 311–378), oral argument (R. 408–453), and the filing of briefs before the Board.

[3] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence. Jurisdictional facts are omitted, since no question as to jurisdiction is raised.

tained substantially identical Employee Representation Plans at its Galena Park and Port Neches refineries (R. 465–471; Bd. App. 173–184, 113, 21, 38, 117, 54, 119, 203, 124, 202–203, 223, 247). Upon establishment of these Plans by petitioner, all of the employees automatically became members (R. 465; Bd. App. 19, 41–43, 68–70, 178). Representatives appointed by petitioner comprised one-half of each Plan Council and petitioner could veto any action of the Councils as well as proposed amendments to the Plans (R. 466, 470; Bd. App. 176–177). The Plans provided that petitioner's Board of Directors could at any time terminate the Plans (R. 466; Bd. App. 239, 257). Both Plans were plainly company-dominated (R. 470–471).

During the first two years of the Act's operation petitioner continued to maintain the Plans at both refineries, but in April 1937 the management decided to abandon the Plans. Simultaneously, petitioner set about to replace the Plan at the Port Neches plant with another "inside" organization (R. 486F).[4] At a two-day meeting of the Port Neches employees held during the latter part of April on company time (R. 481; Bd. App. 70–71, 76; Pet. App. 312–313), Vice President Halpern and Dorwin, petitioner's attorney, made plain to

[4] The allegations of the complaint that petitioner had dominated and interfered with the formation of The Houston Works Employees Federation of The Texas Company, a labor organization at the Galena Park Refinery, were dismissed by the Board (R. 486J).

the employees the management's continued hostility toward the Union and its continued preference for a labor organization similar to the Plans (R. 481–484, 486F). Halpern and Dorwin talked of "turbulence," sit-down strikes, and other species of violence and illegality, activities which they identified with the C. I. O., the Union's parent organization (R. 482–484; Bd. App. 156–159, 163–164, 262, 268–269, 270–272, 291–292). Although the Union's policy opposed coercive solicitation of members (Bd. App. 159, 160, 270), Halpern and Dorwin guaranteed employees "their right not to join any organization they didn't want to join" and urged them to rely upon petitioner for protection against coercion by the Union (R. 482–483; Bd. App. 270–271, 284). During a purported explanation of the Act, Dorwin, seconded by Halpern, told the employees that petitioner would never enter into a contract with the Union on any subject and warned that, regardless of whether the Union represented a majority, any attempt on its part to obtain exclusive recognition or to obtain a closed shop would be rejected by the management (R. 482–483; Bd. App. 160–161, 266–268, 272–273). Praising individual bargaining, as distinguished from collective bargaining (Bd. App. 157, 165, 263–264, 270), Halpern contrasted the Union's practice of dealing through representatives and committees with the happy situation illustrated by the meeting, where all the employees were "sitting together with management" and could "tell any-

thing they feel is wrong * * *" (Bd. App. 273–274), and insisted that "if anybody will tell me that is better bargaining than sitting here with 550 men and letting them say what they want, I'll give up * * *" (R. 483–484; Bd. App. 281, 290). After referring in derogatory terms to the representation of the employees in past conferences between petitioner and the Union, Halpern concluded his description of such a conference with the statement that it showed "how truly you were represented" and "how much bargaining you got * * * Hell, wasn't a Port Neches man there. So you fellows got some swell representation as far as I can see" (R. 483; Bd. App. 161–162, 281–282). Having disposed of the Union as a bargaining medium, petitioner's officials proceeded to impress upon the employees the form which petitioner desired their representation to take. Dorwin praised an independent organization existing at one of petitioner's plants (Bd. App. 264). Halpern held forth upon the superiority over the Union, with its tendency to resort to strikes and its representative methods, of intra-company adjustment of grievances and discussion of working conditions under the machinery of the Plan (R. 483, 484; Bd. App. 160–162, 165, 166, 271–272, 273–274), reiterating that "you have always got the right to bargain as an individual. I personally think it is a good idea for people to affiliate themselves to the extent that they have got the same

method of bargaining collectively. I just leave that thought with you" (Bd. App. 157, 270). Finally, Dorwin told the employees that, despite the validation of the Act, the Plan, with some minor adjustments, was legal and would be continued (R. 482; Bd. App. 264–265).

A few days after this meeting Vice President Halpern caused the management representatives on the Plan Council to be withdrawn (R. 486; Bd. App. 35–36, 59–60, 114–115, 123–124). Superintendent Dengler then informed the employee representatives on the Council that this withdrawal did not reflect upon the legality of the Plan, and suggested continuance of the rump of the Plan Council with some minor changes, which he proceeded to outline (R. 486, 486F; Bd. App. 258–260, 123). The Plan was not dissolved and so far as appears petitioner took no steps to explain its status to the employees (R. 470). The employee representatives on the Plan Council, under the leadership of Chief Shipping Clerk Kofahl,[5] continued to function, substantially in accordance with Superintendent Dengler's recommendations, under the name "Employees Brotherhood" (R. 486–486A; Bd. App. 35–36, 58, 59, 136,

[5] Kofahl, an employee of 31 years' service with petitioner, had three or four employees subject to his direction, earned a salary comparable to that of persons occupying admittedly supervisory status, and since 1934 had been prominent in the Plan (R. 486–486A; Bd. App. 87–88, 94, 61–62, 91, 240–241, 245, 250).

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146, 147). About a month thereafter, i. e., around the end of May, the Employees Brotherhood merged with another "inside" union known as the "Employees Independent Federation" to form the Brotherhood as it was constituted at the time of the hearing (R. 486A–486B; Bd. App. 135, 146–147). The Board found that the Federation, which was initiated by a group including Kofahl and Bigler, Jr., the son of the general construction foreman who was chairman of the Plan Council (R. 486A; Bd. App. 78, 129, 258, 101, 145), was formed as the direct result of the decisions of this Court upholding the Act (R. 486E). After the first Federation meeting Kofahl returned to the Plan Council as a basis for future organization, leaving Bigler, Jr., in control of the Federation (R. 486A; Bd. App. 145–146).

The Brotherhood was officered and controlled by persons prominent in the Plan and identified with the management (R. 486B, 486D; Bd. App. 85, 89, 132, 147). Aside from the elimination of management representatives from the Council, the Brotherhood's constitution was virtually a restatement of the Plan (R. 486B; Bd. App. 296–301). As under the Plan, employment by petitioner automatically entailed membership in the Brotherhood; there was no provision for membership meetings and no regular dues were required (R. 486B; Bd. App. 178, 296–298, 84–85, 90, 91, 93, 94, 148, 98–99, 301). The Brotherhood elections, which adhered closely to the procedure followed under the Plan (Bd. App. 20, 69–70, 71–73, 91–93, 242–244), were

conducted, with full knowledge of petitioner's officials (R. 486C; 384, 385, 396; Bd. App. 125–126), on company time and property (R. 485, 486C, 486D; Bd. App. 71–77, 95–96, 97–99, 100–101, 104–105, 109, 111–113, 125–126, 149–150, 152–153) and with the use of facilities formerly accorded the Plan by petitioner (R. 486C; Bd. App. 140, 144–145). Petitioner's tacit support was supplemented by explicit manifestations of approval of the Brotherhood and of hostility toward the Union (R. 484–485; Bd. App. 101, 110–111; *cf.* 28–30, 33, 39–40, 57–61, 63, 323–324).

After the elections, the Brotherhood became almost completely inactive (R. 486D–486E; Bd. App. 84, 89, 90, 97, 107, 115, 133, 153) until petitioner resurrected it to defeat the Union's request, in April 1938, for recognition as the exclusive bargaining representative of the Port Neches employees; at that time petitioner refused to recognize the Union without an election in which the Brotherhood would appear on the ballot (R. 485E; Bd. App. 166–167, 341–342). So far as appears, this condition was interposed by petitioner without consulting the Brotherhood or inquiring whether it wished to participate in the election.

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 486F–486H). Its order required petitioner to cease and desist from its unfair labor practices, including its domination of and interference with the Plans at both

the Port Neches and Galena Park refineries, to withdraw recognition from and disestablish the Employees Brotherhood at Port Neches, and to post appropriate notices (R. 486I–486J).

On November 25, 1939, the Company filed in the Court below a petition to review and set aside the Board's order (R. 509–524). On June 19, 1940, the Court handed down its opinion (R. 591–592) and on July 15, 1940, entered its decree enforcing the Board's order in full (R. 593–594). On August 7, 1940, a petition for rehearing filed by petitioner (R. 595–600) was denied (R. 601).

ARGUMENT

1. Petitioner's contention (Pet. 5–10) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra,* pp. 3–9) affords full support for the challenged findings. Petitioner further contends (Pet. 12–13) that in holding that the Board's findings have the requisite evidentiary support the decision below is in conflict with various enumerated decisions of other Circuit Courts of Appeals; however, each of the cases cited turned, like the present case, upon its own particular facts.

2. Petitioner contends (Pet. 4, 11) that, despite the admitted (Pet. 11) validity of the findings that petitioner interfered with, dominated, and supported the Employee Representation Plans, the

cease and desist order (R. 565) was improper because petitioner voluntarily abandoned the Plans prior to the order. This raises no question not controlled by the express terms of the Act (Section 10 (c)) and heretofore settled by decisions of this Court. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 230; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 271.

3. Petitioner also asserts (Pet. 4, 6, 12) that because certain of the subsidiary findings upon which the Board rested its conclusion that petitioner interfered with, dominated, and supported the Employees Brotherhood and coerced the employees in the exercise of their right of self-organization, concerned speeches made by company officials to the employees (see pp. 5–7, *supra;* R. 481–484, 486F), the Board's order abridges petitioner's freedom of speech in violation of the First Amendment. However, no defense based upon the First Amendment was raised before the Board, or before the court below prior to judgment, and the court made no mention of the point in its opinion (R. 591–592).[6] The petition for rehearing advanced the contention

[6] The fact that the Board suggested in its brief filed in the court below (Brief for the National Labor Relations Board, No. 9349, April Term, 1940, Circuit Court of Appeals for the Fifth Circuit, note 28, pp. 28–29) that the speeches could not be defended upon the basis of the First Amendment, is immaterial; it was incumbent upon petitioner to raise the point. *Strader* v. *Baldwin,* 9 How. 260, 262; *Sully* v. *American National Bank,* 178 U. S. 289, 297.

for the first time (R. 597) but the order (R. 601) denying that petition without opinion did not necessarily pass upon the point: the court may have concluded that since the contention was not advanced before the Board it could not be raised before the court (Section 10 (e), (f)), or that it was raised tardily, or that since the Board's findings of unfair labor practices were supported by the other substantial evidence reviewed in the Statement (pp. 3–9, *supra*), no portion of the Board's order turned upon the validity of the particular subsidiary findings reached by the contention. *Cf. Fullerton* v. *Texas,* 196 U. S. 192.

Furthermore, in the present case the court held that the Board's findings of fact were supported by substantial evidence (R. 591–592); presumably this holding included the finding (R. 484) that the speeches in question interfered with, restrained, and coerced the employees. Therefore, even if the court below passed upon petitioner's free-speech contention, its holding was merely that oral communications properly found by the Board to be coercive in fact are not protected by the First Amendment.[7] Such a holding would not be in clear

[7] Subsequent to its decision in the present case the court below enforced an order of the Board over objection that some of the findings upon which it was based concerned statements allegedly protected by the First Amendment. *Continental Box Co., Inc.*, v. *National Labor Relations Board*, 113 F. (2d) 93. The court said (at p. 97):

"* * * The constitutional right of free speech in regard to labor matters is just as clearly a right of employers

conflict with the cases cited by petitioner.[8] In the *Midland Steel* case, the Circuit Court of Appeals for the Sixth Circuit held that certain letters and statements addressed by the employer to the employees, upon which a portion of the Board's order was based, were not coercive in fact and that a prohibition of noncoercive communications by an employer was contrary to the First Amendment. The court confined itself to an inquiry into the question whether the communications were intended to or actually did exert "pressure" amounting to "compulsion" or "interfere with or restrain attempts to organize," and based its decision upon the factual conclusion that they constituted an effort by the employer to "secure cooperation" with the employees and were "wholly lacking in any element of threatened discrimination because of union

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as of employees, and if the act purported to take away this right, it could not stand * * *. But the enforced statute has not undertaken at all to interfere with or limit the right of free speech. All that the statute prohibits is domination, interference and support. The employer has the right to have and to express a preference for one union over another so long as that expression is the mere expression of opinion in the exercise of free speech and is not the use of economic power to coerce, compel or buy the support of the employees for or against a particular labor organization."

[8] *National Labor Relations Board* v. *Ford Motor Co.*, decided October 8, 1940 (C. C. A. 6th); *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800 (C. C. A. 6th); *Jefferson Electric Co.* v. *National Labor Relations Board*, 102 F. (2d) 949 (C. C. A. 7th); *National Labor Relations Board* v. *Asheville Hosiery Co.*, 108 F. (2d) 288 (C. C. A. 4th); *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9th).

membership or activity" (113 F. (2d), at 804). It is not clear whether the refusal of the same court in the *Ford* case to enforce an order of the Board requiring the company to cease and desist from distributing to its employees pamphlets disparaging labor organizations, was based upon the court's determination that the pamphlets previously distributed were not coercive, or upon the ground that the Act could not constitutionally be applied to prevent even coercive expressions by employers of their views on labor matters. If the latter, the *Ford* decision might be said to be in conflict with the decision in the present case, assuming that the First Amendment contention was passed upon by the court below. This Court has recently indicated, however, that it does not regard the *Ford* case as supplying a conflict warranting review of such cases as the present. *Elkland Leather Co., Inc.* v. *National Labor Relations Board,* No. 496, this Term, certiorari denied November 18, 1940 (petition not opposed by the Board).

The *Jefferson Electric, Asheville,* and *Union Pacific Stages* cases do not hold that statements of an employer validly found to be coercive or intimidating in fact are nevertheless protected by the First Amendment; on the contrary, in each of these cases the court expressly or by implication recognized that communications actually coercing the employees in their freedom of self-organization afford a proper basis for a finding of violation of the Act. The inquiry in each case was directed to

the question whether the Board's findings that the statements were coercive were supported by the evidence. In the *Jefferson Electric* case the court was of the opinion that the Board's findings were not adequately supported. In the *Asheville Hosiery* case the Board's order was enforced as to employer utterances which the court agreed were calculated to coerce the employees. In the *Union Pacific Stages* case the court disapproved the Board's finding of coercion as to some of the utterances involved, and approved the finding as to others; the Board's order based upon the latter utterances was enforced.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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